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Economic and Monetary Union as an Example of Differentiated Integration

Abstract: *Despite the over 60 years' experience with European integration (since the Paris Treaty), it remains permeated with certain distinctions and dissimilarities with respect to particular Member States. The Economic and Monetary Union (EMU) is the best example of differentiated integration, since as early as its initial construction it contained significant differences vis-à-vis Member States. The third stage of the EMU (in force since 1 January 1999), the introduction of the single European currency, did not encompass all 15 Member States, but only 11 of them. Greece joined it only in 2002, and the United Kingdom and Denmark had negotiated an opt-out provision in the Maastricht Treaty. This article explores differentiated integration in the EMU framework, and presents as well the consequences for the countries outside the 'hard core' of currency integration, i.e. those states which are the subjects of temporary derogations and which are obliged, by their Accession Treaties, to accept the European currency in the future.*

Keywords: differentiation, integration, European Monetary Union (EMU)

Introduction

Economic and Monetary Union (EMU) is a perfect example of differentiated integration, since as early as its initial construction it contained significant differences vis-à-vis the various Member States. The third stage of the EMU (in force since 1 January 1999), the introduction of

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the single European currency, did not encompass all 15 Member States, but only 11 of them. Greece joined it only in 2002, and the United Kingdom and Denmark had negotiated an opt-out provision in the Maastricht Treaty, which confirmed differentiated integration.

The aim of the paper is to examine the specificity of the EMU as an example of differentiated integration and to discuss its consequences for those countries outside the 'hard core' of currency integration. The paper explores the situation of those states which are the subjects of the temporary derogation and are obliged by their Accession Treaties to accept the European currency in future. This analysis is justified by the fact that, in the institutional dimension, the derogation means that a particular EU Member State does not participate in the decision-making process concerning the euro-zone. At the same time, upon accessing the euro-zone those states with a temporary derogation, including Poland, will be bound by the full EMU *acquis* and the regulations implemented in response to the financial and debt crisis in the EU, including those they which they could only partly influence. This situation, i.e. whereby Poland can hardly influence the decisions related to formation of the euro-zone it is obliged to join in the future – can only be regarded as unfavourable. This explains the necessity to analyse the consequences of differentiated integration within the EMU for those states obliged to introduce the euro in the future.

Three questions are posed in this article: 1) Is differentiation necessary in certain areas of integration, such as economic and monetary integration? 2) Is there, or has there been, any alternative to differentiated integration within the EMU? 3) Is it possible to regard the crisis as a critical factor contributing to differentiation within EMU?

As regards the methodology used in this paper, the analyses are based on theoretical assumptions related to the concept of differentiated integration and on analysis of selected instruments considered to be responses to the crisis. These include the legal acts accepted at the EU level, but also – as in the case of the Treaty establishing the European Stability Mechanism (ESM) – those accepted outside of the EU in accordance with the so-called Schengen method.

1. The notion of differentiated integration – introduction to the concept

Despite over 60 years' experience with European integration (since the Paris Treaty), it remains permeated with certain distinctions and dissimilarities with respect to particular Member States. In the context of European integration 'differentiation' is understood as a general term

for the opportunities available to Member States to have different rights and obligations with respect to some common policy areas.[1] This term is often used interchangeably with the notion of 'flexibility'.

The discussion on differentiated integration results from the deepening differentiation defined in categories of economic development.

In the 1990s there were three dominant concepts of differentiated integration:[2] 1) the multi-speed model;[3] 2) the concept of variable geometry;[4] and finally 3) the opt-out model, also described as 'Europe à la carte' model,[5] 'core Europe' or 'pick and choose Europe'.[6]

The last model is based on options given to individual states, considering their participation in the integration process in certain areas. It is the source of numerous controversies, as it allows certain countries to pick and choose which particular programs and policies they wish to adopt.[7] The right to choose, i.e. to 'opt-out', threatens the uniform EU structure and grants priority to national preferences over common purposes in selected areas. As a result, certain countries choose only the most beneficial forms of participation in community policies. In other words, 'flexibility' implies the right of Member States to choose *not* to participate in particular policies.[8] However, insofar as the EMU is concerned, this situation refers only to two countries – the United Kingdom and Denmark. No other countries are allowed to opt-out. Moreover, as EMU is considered as a part of the *acquis communautaire* – except with respect to the two countries which chose to opt-out – it is also a classic case of multi-speed integration,[9] understood as

[1] A. Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration*, Rowman & Littlefield, Lanham 2006, p. 14.

[2] A. Zielińska-Głębocka, *Dynamika Unii Europejskiej w świetle teorii integracji (Dynamics of the European Union in the Light of Theory of Integration)*, "Studia Europejskie", No. 3/1999, p. 25 ff.

[3] G. Majone, *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?*, Cambridge University Press 2014, pp. 228–229.

[4] N.von Ondarza, *Strengthening the Core or Splitting Europe? Prospects and Pitfalls of a Strategy of Differentiated Integration*, "SWP Research Paper", March 2013, p. 8.

[5] M. Cini, *European Union Politics*, Oxford University Press, Oxford 2007, p. 397.

[6] D. Thym, *The Evolution of Supranational Differentiation. Assessing Enhanced Cooperation, the Area of Freedom, Security & Justice and the Common Foreign & Security Policy under the Treaties of Nice and Lisbon*, "Walter Hallstein-Institut Paper", 03/2009, p. 2, http://www.whi-berlin.eu/documents/whi-paper0309.pdf.

[7] D. Webber, *The Politics of Differentiated Integration in the European Union: Origins, Decision Making and Outcomes*, "Working Papers Series", No. 1/2012, p. 4.

[8] A. Wareigh, *Which Model for the European Union?*, Sheffield Academic Press, London-New York 2002, p. 4.

[9] G. Majone, *Rethinking European Integration after the Debt Crisis*, The European Institute "Working Paper", No. 3/2012, p. 25.

a situation whereby a group of Member States aims to realize a common policy faster than the other Members, who will follow later.[10] The idea of multi-speed integration was included in the Maastricht Treaty, based on the idea that since the convergence criteria had to be fulfilled, transition periods would be necessary.[11] Thus there are still seven countries (out of the 28 EU Member States currently envisioned as constituting the euro-zone) which are not yet members but are obliged to join the euro-zone in the future. At the same time, the term 'multi –speed' is subject to some dispute, as it seems to assumes that all EU members have the same goal and move in the same direction, which does not reflect the current state of affairs. It is thus posited that three distinct categories of EU Member States may be distinguished: 1) those in the euro-zone; 2) those aspiring to join the euro-zone; and 3) those who do not wish to join the euro-zone.[12] The issue of 'unwillingness' is one that influences differentiated integration.

What's more, one can observe a greater fragmentation in the scope of monetary integration as a consequence of the 2008+ crisis in the euro-zone and the instruments undertaken in its wake. Strengthening the euro-zone increased the gap between the EU's hard core and its outer periphery.[13] During the crisis, Member States were acting through whatever channels were available to them.[14] Several reforms were adopted by and for the euro-zone only, whereas another part of the new regulations was related to both the members of the euro-zone and selected EU states. There were also solutions aimed at the states within the euro-zone, but with the possible participation of those states with the derogation. As a result, the measures introduced during the crisis have brought differentiated integration to a new level.[15] Furthermore, the euro-zone crisis undeniably altered the cost-benefit analysis of euro area membership, thus affecting and conditioning the 'temporal dimension' of the euro's adoption.[16]

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[10] D. Webber, op.cit., p. 4.

[11] F. Laursen, H. Mouritzen, A. Wivel, *The institutional dynamics of Euro-Atlantic integration* in: *The Geopolitics of Euro-Atlantic Integration*, A. Wivel, H. Mouritzen (eds.), Routledge, London-New York 2004, pp. 50–51.

[12] B. Donnelly, *A Multi-speed Europe: Britain on the Sidelines?* p. 1; available at: http://www.kas.de/wf/doc/kas_36372-1522-2-30.pdf?140108164908 (last visited 23.02.2016).

[13] F. Cameron, *The European Union as a Model for Regional Integration* in: *Crisis in the Eurozone: Transatlantic Perspectives – Essay Collection*, Council on Foreign Relations 2010, p. 20.

[14] A. Hinarejos, *The Euro Area Crisis in constitutional Perspective*, Oxford University Press, Oxford 2015, p. 103.

[15] N. von Ondarza, op.cit., p. 6.

[16] A. Visvizi, P. Tokarski, *Poland and the euro: between lock-in and unfinished transition*, "Society and Economy", No. 36/2014, pp. 446–450.

Differentiated forms of cooperation were designed mainlyto function as a strategy of 'last resort' for European integration. However, in an EU consisting of 28 Member States, their use has expanded considerably. At the level of primary law, in the Treaty of Lisbon several new opt-outs were established, including a protocol partially exempting the United Kingdom and Poland from the Charter of Fundamental Rights. The formal instrument of enhanced cooperation was expanded in scope, and special new forms of flexible cooperation were implemented both in the Common Security and Defence Policy (CSDP) and in justice and home affairs. Together with the Euro Plus Pact and the Fiscal Compact, the use of enhanced cooperation in trans-European divorce law, and the introduction of the new EU patent, differentiation now extends into major areas of EU integration.

2. Constructing the EMU

Introduction of the euro and, as a result, the replacement of national currencies with a single European currency is believed to be one of the major achievements of European integration. However, there was not a sufficient amount of unanimous support with respect to the construction of the EMU, even though its construction, completed successfully, could also be considered to have reached a higher level of integration, according to B. Balassa's classification model. This model, while assuming the effects of a spill-over mechanism in the economic sphere (i.e. that positive results in one sector stimulate integration in others), also assumes possible interference and obstacles, making the process of reaching subsequent stages more difficult. Simultaneously, the process of reaching higher stages in integration can be inspired by the political factor, an example of which is the 1989 Delors Plan of constructing the European Economic and Monetary Union.[17] France, being a determined supporter of the idea of a common European currency, formed a minority group together with Italy and Belgium, while the United Kingdom and Denmark appeared to be the most sceptical towards the idea. Germany, the Netherlands, Luxembourg and the cohesion states were referred to as moderate states, maintaining a certain amount distance toward the concept.

The differentiated attitude among the then-twelve EU states towards the idea of introducing a single currency resulted in unavoidable and

[17] A. Zielińska-Głębocka, op.cit., p. 24; E. Kużelewska, J. Stachura, *Europa w okresie pozimnowojennym* (*Europe in Post-coldwar Period*) in: *Współczesne międzynarodowe stosunki polityczne* (*Contemporary International Relations*), J. Stachura (ed.), Białystok 2010, pp. 104–105.

necessary concessions. The sources of differentiation within the EMU, referring to the range of states participating in this stage of the development of integration, can be found in these concessions. The number of states to be included in the EMU was the subject of a vigorous debate between Paris and Berlin. France, which treated the EMU as a stimulus to the economic development of both the country and the European Union as a whole, at the same time worrying about Germany gaining a hegemonic position in the EU,[18] was in favour of the EMU being open to all those states willing to access it, regardless of how powerful, or weak, their economies were. Germany (whose society was openly worried about replacing a stable German Deutsche Mark with the single European currency) took an opposite position. Focusing on the reliability and stability of a common currency, they supported the idea of having fewer countries within the EMU, being at first narrowed to the so-called 'Old Europe' states and excluding the less-developed southern European countries. In the end France won the debate.[19] Concurrently, France supported Germany as the future headquarters of the European Central Bank. French intentions were rather obvious: Mitterrand was convinced that locating the ECB in Frankfurt was the only tool to help overcome the objection of Bundesbank to replacing the DM with the Euro. The price to pay for ending the hegemonic position of German currency was, thus, viewed as not too high by France.[20]

France, trying to reduce Germany's hegemonic position in the economy, became a major supporter of inviting the largest possible number of states to the third stage of the EMU. While the financial crisis of 2008, the biggest and most serious one in the short history of economic and monetary union, exposed the risk involved in implementing the French project for economic and currency integration within EU, it needs to be emphasized that at the time the decision was made its assumptions were based on sound economics. First of all, the larger is the number of the states within the EMU, the lower the transaction costs of introducing the new single currency and the higher the expected dynamics of economic growth, due

[18] Ch. Schweiger, *The EU's multiple cores and the CEEs: A threat or an opportunity?*, "Yearbook of the Institute of East-Central Europe", No. 11(5)/2013, p. 4.

[19] J. Ciesielska-Klikowska, *Francja i Niemcy w procesie powstawania Unii Gospodarczej i Walutowej Unii Europejskiej* (*France and Germany in the Process of Establishing Economic and Monetary Union of the European Union*), "Rocznik Integracji Europejskiej", No. 3/2009, p. 157, pp. 157, 167–168.

[20] P.Ch. Wood, *The Franco-German Relationship in the Post-Maastricht Era* in: *The State of the European Union*, C. Rhodes, S. Mazey (eds.), Lynne Reiner Publishers, Boulder, CO 1995, p. 227.

to increased competition within the common currency area. What's more, the more countries were in the euro-zone, the greater the importance of the European currency as an international currency. Considering the above, it needs to be mentioned that the euro can be considered as an excludable network good, in the sense that its utility grows with the number of participants (and conversely, that non-participating countries are excluded from these positive effects).[21]

The use of the collective goods theory and the theory of externalities deserve attention when explaining differentiated integration using most rationalist approaches. Based on theories of collective goods and externalities, A. Kölliker formulated the hypothesis of the willingness of initially-opposed members to join these arrangements later (as excludable goods generate strong incentives to join).[22] This assumption seems to be very rational, but does not take into consideration 'ideological' preferences that could overcome the goods-based incentives, or national constraints which could force governments to opt out. These factors may explain why some specific empirical cases (e.g. the opt-out countries) contradicted Kölliker's expectations. On the other hand, support for Kölliker's hypothesis could be the further enlargement of the composition of the euro area, which currently consists of 19 members.

It also needs to be mentioned that the EMU, by aiming at including the widest possible range of states able to access it, was faced with two immediate challenges: a) the inability and b) the unwillingness of particular Member States to join the EMU.

As far as inability is concerned, the assessment of the readiness of various states to introduce the single currency required the establishment, to be followed by the verification of, certain criteria that needed to be met (the 'convergence criteria'). Here it needs to be stressed that from the start the form of the criteria became the subject of debates between France and Germany, and that the form ultimately accepted indicates the intention to extend the range of states meeting them. While Germany (supported by the Netherlands) opted for a long convergence process and did not feel it necessary to specify the exact deadline of establishing the EMU, France and Italy even disapproved of the necessity to have convergence criteria at all. In the end the German/Dutch approach was reflected in

[21] A. Kölliker, *Bringing Together or Driving Apart the Union? Towards a Theory of Differentiated Integration*, "Max Planck-Projektgruppe Recht der Gemeinschaftsgüter", No. 5/2001, pp. 21–22.

[22] K. Holzinger and F. Schimmelfennig, *Differentiated integration in the European Union: many concepts, sparse theory, few data*, "Journal of European Public Policy", No. 19/2012, pp. 299–300.

the Maastricht Treaty. The two sides accepted the final date of the EMU's construction and implementation, perhaps as a form of concession.[23]

The Delors Report contributed to constructing the Maastricht Treaty, which confirmed that one of the major long-term priorities of the European Union was establishing the Economic and Monetary Union. The EMU's basic features were defined in the Treaty on European Union, referring to its central bank, national budget policies within the Union, decision-making procedures in particular institutions within the Community, and the criteria that should be met by those states wishing and able to join the EMU, as well as the timetable for its implementation.

The plan for constructing the EMU consisted of three phases:

Stage 1 – 1990–1993: EC states were to provide for entirely free capital movement as well as improve the European Monetary System and tighten the co-operation among national central banks. The United Kingdom opted out of moving automatically to Stage 2.

Stage 2 – 1994–1998: The EMI (European Monetary Institute) was to be established as a forerunner of the European Central Bank. Its role was to engage in the necessary preparatory work on the new currency and emission of banknotes. The continuation of the process of deepening the cohesion between the national economic and monetary policies in the EU states was also anticipated. By the end of Stage 2, national banks were to become independent from the governments of EU Member States. In Madrid in December 1995 the new name for a single currency was accepted – the euro (earlier the term 'ECU' was used to refer to the European currency unit). The European Council accepted the Pact on Stability and Growth and an exchange-rate mechanism in Amsterdam (ERM II) in June 1997. Then the TARGET (Trans European Automated Real Time Gross Settlement Express Transfer) system was established, providing for automatically calculating national currencies into euro. In May 1998 the European Council approved 11 states as being able to move to Stage 3 of the EMU's construction. In June 1998 the European Central Bank was established.

Stage 3 – this phase was to initiate the establishment of the Economic and Monetary Union. The new single European currency was gradually implemented. At the beginning (1999–2001), it functioned only as a non-cash circulation, and only on 1 January 2002 were euro banknotes and coins issued. Up to 30 June 2002 the euro was supposed to operate simultaneously with national currencies, and to become the sole legal currency in the EMU states from July 2002.

[23] Ch. Wyplosz, *European Monetary Union: The Dark Sides of a Major Success*, "Economic Policy", Vol. 21, No. 46/2006, pp. 6–7.

The states participating in the EMU were required to meet certain conditions, alternately called the 'convergence criteria' or 'Maastricht criteria'. These criteria encompassed the following conditions: 1) The Government debt must not exceed 60 per cent of GDP; 2) The Government budget deficit must not exceed 3 per cent of GDP; 3) average inflation rate must not exceed the unweighted arithmetic average of the similar HICP inflation rates in the three EU Member States with the lowest HICP inflation rate, plus 1.5 per cent; 4) Average long-term interest rates must not be more than 2.0 per cent higher than in the three EU Member States with the lowest HICP inflation rate; 5) Exchange rate stability in applicant countries must not have devalued the central rate of their euro-pegged currency during the previous two years, and participation in the exchange-rate mechanism (ERM / ERM II) under the European Monetary System (EMS) for two consecutive years is obligatory.

The convergence criteria defined in the Treaty, being the conditions for introducing the single currency, were undoubtedly difficult to meet for numerous Member States and demanded tremendous effort and determination. Satisfying results were achieved with respect to price stability, the government budget deficit, long-term interest rates and exchange rate stability, but the level of the government debt still remained a challenge. In 1997, only four countries (France, Finland, Luxembourg and United Kingdom) attained the debt-to-GDP ratio below the 60 per cent criterion established. If all the criteria met by the Member States are analysed in detail, a certain violation of the literal interpretation of the Treaty regulations with respect to the criteria on participation in the Exchange Rate Mechanism can be proven.[24] In the cases of Italy and Finland, the decision on accessing the EMU was taken after 15 and 16 months, respectively, of their participation in ERM.[25]

Inasmuch as a common currency cannot bear too much national diversity and since the economic reasons were weak, the rationale behind the EMU must have been political. The decision resulted, somewhat remarkably, from the confluence of two different political intents: German and French. But what must be born in mind is that the French

[24] According to Protocol on the convergence criteria (Article 3): 'The criterion on participation in the Exchange Rate Mechanism of the European Monetary System [...] shall mean that a Member State has respected the normal fluctuation margins provided for by the Exchange Rate Mechanism of the European Monetary System without severe tensions for at least the last two years before the examination'; Treaty on European Union, OJ 1992 C 191/01.

[25] European Monetary Institute, *Convergence Report. Report required by Article 109j of the Treaty establishing the European Community*, 1998, pp. 7–22.

(and Italian) wish to counter the German hegemony in the framework of monetary affairs pressured them into adopting a hard currency policy which poorly fitted their national economic situations.[26]

Constructing the Economic and Monetary Union was a huge challenge for the European Communities. This process demanded that each Member State joining the European Monetary System attain a very high level of liberal capital movement, the harmonization of financial laws, integration on the financial market within the communities, and a hardening of their exchange rates. The EMU was a both a consequence and a complement of the single market within the euro-zone. Its efficiency was increased due to, *inter alia*, abolishing the limitations associated with the costs of transactions carried out in different currencies. The EMU required a lot of determination in particular countries, as well as firm economic and institutional bases. Meeting all the economic conditions required to join the EMU resulted from the mobilisation of all the political, social and economic powers in the states that were successful in attaining EMU participation.

In May 1998 the Council of Europe selected the states to participate in the third stage of joining the EMU. Initially, eleven of fifteen Member States participated in this stage, with Denmark, the United Kingdom, Sweden and Greece left out of the euro-zone, Denmark and the United Kingdom based on their having exercised their opt-outs provided for in the protocols. In 2000 Denmark held a national referendum, asking citizens whether they wished to introduce the euro. The result was negative; the Danish were in favour of retaining their national currency. A similar referendum was called in Sweden in 2003; its result was negative as well.[27] It is worth mentioning that Greece was the only EU Member State which did not meet the convergence criteria; however it joined the EMU in 2002. The states not participating in the EMU were granted a derogation. With respect to Denmark and the United Kingdom, it is a permanent derogation and these states are not obliged to join the EMU. Other EU Member States, Sweden and the states which joined the EU later, were granted a temporary derogation, which means they are obliged to join the EMU after they meet the convergence criteria. The decision concerning this matter will be taken by the Council, composed of the heads of states or governments, by qualified majority after a motion is

[26] H. Deters, *National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict*, "European Law Journal", Vol. 20, No. 2/2014, p. 207.

[27] E. Kużelewska, *Duńskie i szwedzkie referendum w sprawie przyjęcia euro* (*Danish and Swedish Referendum on Adoption of Euro*), „Przegląd Prawa Publicznego", No. 1/2008, pp. 56–71.

proposed by the European Commission and after the European Parliament has been consulted. The exchange rate is decided unanimously by the states participating in the EMU and the states being the candidates to participate in this union.

The possibility of leaving the EMU is not provided for in the treaties. The Treaty on European Union, in Art. 2 establishing the EMU and anticipating the single currency, practically denies this possibility. However, it needs to be borne in mind that EU Member States enjoy sovereignty, hence they are legally allowed to leave the EMU. Nonetheless any Member State wishing to exit the euro-zone would need to reach a certain compromise, as the economic consequences to the European Union in the event one of the Member States left the EMU could be significant. Leaving the euro-zone would not automatically restore the national currency; a new currency would have to be established.[28] Hence the possible Grexit scenario would set a precedent for the entire euro-zone.[29]

3. Dealing with unwillingness

There are numerous legal possibilities for keeping up a 'multi speed' process in European integration. There are two dominant legal instruments in support of a multi speed approach within the European treaties. Art 114(4) TFEU, first introduced with the Single European Act, permits Member States to implement national regulations after they have been outvoted by a qualified majority in the Council. The other mechanism is the provision for closer cooperation contained in Art. 20 TEU. It allows a majority of Member States to aim at deeper integration as a last resort when there are no other methods to reach such integration within the EU framework.[30]

The United Kingdom and Denmark belong to the narrow group of states which are less involved in integration. The opt-out principle was adopted as a result of negotiations over the Maastricht Treaty, in the form of protocols excluding certain countries from particular programs, e.g. the United Kingdom and Denmark from the Economic and Monetary

[28] M. Herdegen, *Prawo europejskie* (*The Law of the European Union*), C.H. Beck, Warszawa 2004, p. 262.

[29] G. Rachman, *The three perilous options for Greece facing Europe* (2015), "Financial Times", http://www.ft.com/intl/cms/s/0/a3a91496-18b8-11e5-8201-cbdb03d71480.html#axzz3jGBq9S66 (last visited 10.10.2015).

[30] Ch.B. Jensen and J.B. Slapin, *The politics of multispeed integration in the European Union* in: *European Union. Power and Policy Making*, J. Richardson and S. Mazey (eds.), Routledge, London–New York 2015, p. 67.

Union, Denmark from the defence policy, and the United Kingdom from the Social Security card.[31] The British and Danish decisions to opt-out resulted, *inter alia*, from the fact that they deemed the policy costs for participating in the EMU as too high.[32]

The Single European Act (in force since in 1987) marked the beginning of an important phase in the deepening of European integration. It anticipated implementation of the Treaty on European Union. Its purpose was to provide the proper conditions for monetary union and, in the longer perspective, for the political and economic integration of the EU.[33] In December 1990 two conferences on political and economic union were held in Rome. They resulted in signing the Treaty on European Union in Maastricht on 7th February 1990. It entered into force on 1 November 1993, ten months later than expected. The reason for this delay was that the Treaty was rejected in a referendum in Denmark in 1992. This caused a serious political crisis, as both the establishment of the Union and Danish membership in the Community were put in doubt, as ratification of the Treaty required the consent of all Member States. Therefore, it was agreed that there were no obstacles preventing Denmark from the participation in the process of integration, and the conditions of Danish participation were established in order to ensure that the next referendum results would be positive. During the Summit in Edinburgh in December 1992, the Danish government succeeded in negotiating opt-outs from the Maastricht Treaty in the areas of: introduction of the euro; participating in EU defence policy; and certain aspects of home affairs and European citizenship. To conclude, the legal position of Denmark in the EU is governed by two acts:[34] 1) Protocol 26 on certain provisions relating to Denmark attached to the Amsterdam Treaty; 2) the Conclusions of the European Council meeting in Edinburgh in 1992.

During the Maastricht negotiations the Danish situation differed from that of the UK. Most Danish political parties supported the EMU. In fact the Danish government had apparently already accepted the Maastricht Treaty when it was rejected in the Danish referendum. Unlike the UK, Denmark had accepted an unconditional start to the second stage of EMU

[31] R. Adler-Nissen, *Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty*, "West European Politics", Vol. 34(5)/2011, pp. 1094–1095.

[32] Ch.B. Jensen and J.B. Slapin, op.cit., p. 70.

[33] E. Kużelewska, *Referendum w procesie integracji europejskiej*, ASPRA-JR, Warszawa 2006, p. 236.

[34] D. O'Keeffe and C. Turner, *The Status of Member States Not Participating in the Euro*, „The Cambridge Yearbook of European Legal Studies" 2011, p. 296.

and endorsed an important role for the ECB.[35] As a response to the Danish citizens' rejection of the Treaty in the referendum, the Danish government prepared a White Book, in which the overall situation was analysed. Eight possible scenarios were discussed, including the two most extreme ones, i.e. from leaving the European Economic Area to full ratification of the Treaty.[36] The main task for the government was to find a solution which would be accepted by the citizens in the second referendum.

The British government, on the other hand, was critical of the EMU idea from the outset, regarding it as an attempt to establish a United States of Europe. According to Protocol no. 25 on certain provisions relating to the UK and Northern Ireland (1992), annexed to the Treaty establishing the European Community, the UK was granted an opt-out clause. This meant that the UK was not required to participate in the third stage of EMU and introduce the euro. The UK thus still remains officially in the second stage of EMU. The opt-out clause was a condition put forth by the UK in order for it to approve the treaty as a whole. Article 10 of the Protocol states that the UK may change its notification and join the single currency after the beginning of the third stage.[37]

Nowadays the opt-out on home affairs for Denmark plays a completely different role than envisioned when it was formulated back in 1992. The political reactions and guaranties given to the Greek government following the global economic crisis in 2010 proved, in the minds of many Danes, that the opt-outs (especially euro-zone opt-out) protect Danish interests and independence.[38] The Danes are cautious, if not reluctant, when it comes to closer cooperation within the EU. On December 2015 the voters rejected opting into justice and home affairs (JHA) cooperation in the EU.[39] A "helpful" factor that pushed people toward this decision was undoubtedly the EU's refugee crisis.

At the same time however, those in charge of the integration process see opt-outs as problematic. They are criticized because, firstly, they

[35] R. Adler-Nissen, *Opting Out of European Union. Diplomacy, Sovereignty and European Integration*, Cambridge University Press, Cambridge 2014, p. 80.

[36] F. Laursen, *The Maastricht Treaty: Implications for the Nordic Countries*, "Cooperation and Conflict", Vol. 28 (2)/1993, p. 130.

[37] D. O'Keeffe and C. Turner, op.cit., p. 295.

[38] R. Adler-Nissen and T. Gammeltoft-Hansen, *Straitjacket or Sovereignty Shield? The Danish Opt-Out in Justice and Home Affairs and Prospects after the Treaty of Lisbon*, "Danish Foreign Policy Yearbook" 2010, p. 156.

[39] C. Sørensen, *To be, or to be out: Reflection on the Danish referendum*, "Commentary", No. 29/10 December 2015, available at: https://www.ceps.eu/system/files/Danish%20 Referendum_0.pdf, p. 1.

invalidate the unified EU legal order. Secondly, they are considered to constitute threats to the democracy and transparency of EU policy-making processes. Finally, they are seen as undermining the solidarity between Member States.[40]

4. Crisis versus differentiation in the Economic and Monetary Union

The tenth anniversary of the Economic and Monetary Union was unfortunately accompanied by the biggest and most acute crisis in its short existence. The euro-zone crisis highlighted its inadequacies, in particular the lack of sufficient instruments that could provide fast and effective financial relief to the most vulnerable euro-zone countries.

The revision of the statistical data relating to the public finance sector in Greece revealed a deep debt crisis there and resulted in a sequence of events that led to the necessity to provide external assistance. The efforts made to restore and maintain stability in the euro-zone were both necessary and urgent.

Several reforms enacted in response to the crisis concerned only the Member States of the euro-zone (like the so-called 'two-pack' or the European Stability Mechanism), whereas other regulations concerned both the members of the euro-zone and selected EU states (as in the case of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union). There were also the solutions aimed at the states within the euro-zone which permitted the possible participation of the states with the derogation (as in the cases of the single supervisory mechanism or single restructuring mechanism – constructing the pillars for a banking union). Here the question arises whether these solutions, meant to strengthen economic governance within the EU, do not also lead to its fragmentation? Examination of this question requires an analysis of selected instruments established as a response to the crisis, with thorough consideration of the scope of the examined regulations. By focusing on this latter aspect it will be possible to perceive how these regulations differentiate between the statuses of Member States. In order to maintain clarity, the analysis requires a chronological perspective.

One of the first attempts to improve the coordination of EU economic policy was the acceptance of the Euro Plus Pact during an informal meeting in March 2011. This Pact – being a certain political obligation – was established by the states within the euro-zone and participation in the

[40] R. Adler-Nissen, *Opting Out of European Union. Diplomacy*…, op.cit., pp. 27–28.

Pact was obligatory on their part.[41] At the same time the Pact was made open to other EU states. Accordingly, on the 24th and 25th of March 2011, the Pact was submitted to the Member States outside the euro-zone so that they would declare their possible accession. During this meeting the following states declared their will to join the Pact: Bulgaria, Denmark, Lithuania, Latvia, Poland and Romania. After certain regulations in the Pact were amended (related to salary policy), Sweden also declared its desire to accede. Hence in the end only the Czech Republic, Hungary and the United Kingdom remained outside of the Pact. However, the European Council concluded that those states could join the Pact at any stage if they wished to do so.[42] It is symptomatic that the Czech Republic justified its objection to participation in the Pact by the fact that its content was elaborated within euro-zone Member States only, ignoring other states, which were offered only a complete ready version.

Differentiation of the status among the EU states is also visible in the instruments which were prepared as intergovernmental agreements in response to crisis. The Treaty on Stability, Coordination and Governance, also called the Fiscal Pact, is an agreement of this type. The Treaty was signed on 2 March 2012 by all members of the euro-zone (17 states at that time) and all remaining EU Member States, with the exception of the United Kingdom and the Czech Republic. Analysis of it reveals a certain flexibility in defining the states being subjects of this Treaty. The criterion is participation in the euro-zone, but the Treaty differentiates the status of these states. A specific status attached to the euro-zone states relates to the Treaty provisions that make the entry into force of the Treaty into force dependent on being ratified by at least 12 euro-zone Member States. This was an important political signal, since it declared that the Treaty would be valid even if not all euro-zone Member States became parties to it.[43]

The provisions of the Treaty were seen as risking the fragmentation of Member States into at least several subcategories:

- euro-zone Member States having signed and ratified the Treaty
- euro-zone Member States having signed but not ratified the Treaty

[41] J. Barcz, *Instrumenty międzyrządowe dotyczące kryzysu w strefie euro a spójność Unii: możliwość przystąpienia państw członkowskich UE spoza strefy euro* (*Intergovernmental Instruments on the Crisis in the Euro-zone and the Cohesion of the Union: the Possibility of Joining by the EU Member States Outside the Euro-area*) in: *Traktat z Lizbony – wybrane zagadnienia* (*The Treaty of Lisbon – Selected Issues*), M. Kenig-Witkowska and R. Grzeszczak (eds.), SAWPI-AUW, Warszawa 2012, p. 109.

[42] Conclusions of European Council (24–25 March 2011), European Council, EUCO 10/1/11 REV 1, p. 6.

[43] J. Barcz, op.cit., pp. 110–111.

- States out of the euro-zone having signed and ratified the Treaty
- States out of the euro-zone having signed but not ratified the Treaty
- States out of the euro-zone having rejected the Treaty.[44]

In the end however all the signatory states ultimately ratified the Treaty, so the scenario of the EU states being fragmented on the basis of a differentiated status within the Fiscal Pact did not come true.

Another intergovernmental agreement differentiating EU Member States' status was the Treaty Establishing the European Stability Mechanism (TESM). Numerous controversies surround the construction of the mechanism, its legal basis, and its content. One controversial issue, which arose during the negotiations over the mechanism (ESM), was that of which states could be parties to the Treaty. There was no disagreement over the euro-zone states participating in the mechanism. As far as the Member States outside of the euro-zone were concerned, the possibility of allowing them to fully participate in the ESM was much discussed. It seemed desirable considering their future accession to the euro-zone. Yet it is worth stressing that there was no pressure put on the states outside the euro-zone to participate in ESM, since this participation entails certain financial outlays and risks, which might not be advantageous to the states outside the euro-zone.[45] The United Kingdom demonstrated an extremely unfavourable viewpoint, assuming that the euro-zone bailout was the problem of euro-zone countries.[46] It was finally decided that those countries could participate *ad hoc* in ESM assistance actions, being invited as observers[47] (but with no right to vote, which could be a seen as a disincentive to participate in assistance actions performed by the ESM). Simultaneously, according to the point7 of the Preamble to the TESM, all EU Member States will participate in the ESM (holding all rights and duties) as a consequence of joining the euro-zone.[48] According to Art. 2 TESM, the membership in the mechanism is open to an EU Member State from the moment a decision of the Council

[44] C. Kosikowski, *Finanse i prawo finansowe Unii Europejskiej* (*Finance and Financial Law of the European Union*), Wolters Kluwer, Warszawa 2014, pp. 227–228.

[45] B. de Witte and T. Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, "Common Market Law Review", Vol. 50 (Issue 3)/2013, p. 813.

[46] L. Gocaj and S. Meunier, *Time Will Tell: The EFSF, the ESM, and the Euro Crisis*, "Journal of European Integration", Vol. 35 (Issue 3)/2013, p. 244.

[47] Art. 6(3) of the Treaty establishing the European Stability Mechanism, Consolidated version following Lithuania's accession to the ESM, http://www.esm.europa.eu/about/legal-documents/ESM%20Treaty.htm (last visited 29.09.2015).

[48] The original words of the point 7 Preamble: 'All euro area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union should become an ESM Member […]'.

of the EU repealing a derogation (as a result of a Member State introducing the euro) enters into force.

Another example of changes exclusively addressed to countries that have accepted the single currency is so called 'Two-Pack', including two EP and the Council regulations of May 2013.[49] Limiting the number of those addressed to euro-zone states seems to be a convincing solution. The European Commission insists that budgetary policy within a single currency area is more interdependent and more prone to be influenced by budgetary decisions in other states within the currency area. In particular, during periods of recession this interdependence relates to the fact that all euro-zone states share the risks entailed by decisions taken in a particular EMU state. Hence the need to take responsibility, both singly and jointly, is implied by this shared risk and budgetary decisions need to be considered as a single issue.[50]

Solutions similar to those accepted in the Euro Plus Pact, with reference to the subject of the regulation, were realized in case of other legal acts established as a response to the crisis, e.g. within the banking union being constructed.[51] The Single Supervisory Mechanism, being one of the pillars of the banking union, assumes all the euro-zone states will automatically participate in the SSM. Those states having not yet introduced the euro have the right to participate, but in order to join the SSM they have to establish 'closer cooperation with the ECB'.[52] Becoming an SSM member on the basis of 'closer cooperation with the ECB' has certain consequences. First, it means bearing the costs of the Supervisory Mechanism. Participating in the SSM also means automatic participation in the second pillar of the banking union – the single mechanism of restructuring and liquidation (with all the costs related there to). At the same time, not participating in the SSM could result in the weakened competitiveness of national

[49] Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ 2013 L 140/56; Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ 2013 L 140/56.

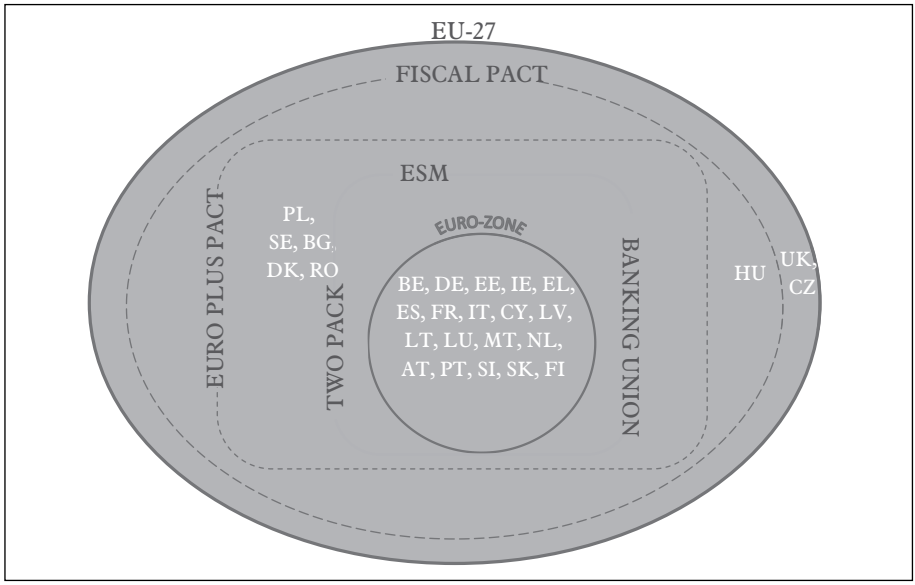
[50] European Commission, 'Two-Pack' enters into force, completing the budgetary surveillance cycle and further improving economic governance for the euro area, Brussels, 2013, Memo 13/457, pp. 1–2.

[51] Ch. Schweiger and J.M. Magone, *Differentiated integration and cleavage in the EU under crisis conditions*, "Perspectives on European Politics and Society", No. 15(3)/2014, p. 261.

[52] Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 L 287/63.

banks, as a higher risk level is attributed to these banks. Staying out of the SSM also brings about another hazard connected with the reduced influence on the banking union being constructed, which the states with a derogation will be obliged to participate in after they join the euro-zone. On the other hand, the influence of those states outside of the euro-zone on the decision-making process within the SSM is rather limited.[53] Interestingly, a state having established 'closer cooperation with the ECB' is entitled – three years after establishing such cooperation – to leave the SSM mechanism. At present, no state outside of the euro-zone has yet decided to participate in the SSM.

Analysis of the subject scope of selected regulations responding to the EMU crisis is presented in graphic form below in Graph 1.



Graph 1. Differentiation among the EU Member States' status under selected regulations responding to the crisis within the EMU

Source: own elaboration.[54]

[53] According to art. 26 of Regulation No. 1024/2013, SSM Member States are represented in a Supervisory Board consisting of: Chair, Vice Chair, four representatives of the ECB, and one representative of the national competent authority in each participating Member State (including states outside of the euro-zone which have established closer cooperation). The Supervisory Board is responsible for, *inter alia*, preparatory works regarding the supervisory task. The final decision is made, however, by the Governing Council, which includes representatives of only euro area countries.

[54] See also: N. Koenig, *A Differentiated View of Differentiated Integration*, "Jacques Delors Institut – Berlin Policy Paper", No. 140/2015, p. 3.

The graph allows detecting the boundary lines dividing the states and their dependence on participation in the euro-zone. Clearly, the states that have accepted the single currency are the main addressees and recipients of the regulations undertaken in response to the EMU crisis. However, as it was already mentioned, there is a certain risk of fragmentation within the euro-zone in the form of differentiation of the states' status – if all the states participating in the euro-zone ratified the Fiscal Pact, its regulations would allow this. Moreover, when discussing the differentiation within the euro-zone another aspect must be considered, which is the position of particular states in the euro-zone within the decision-making systems of the new mechanisms. This mainly concerns the decision-making system within the ESM – established in great haste, outside the EU legal framework, and with questionable democratic legitimacy.[55]

Major decisions, e.g. on financial assistance, require unanimity within the ESM. However, in the event the European Commission and the ECB consider a decision not to provide financial assistance to threaten the stability of the euro-zone, a special procedure can be applied, according to which a majority of 85 per cent of votes is required. In this case the voting weights (Graph 2 below) prevent taking such a decision without German, French or Italian consent. Conversely, the consent of only six states (out of nineteen countries) can be sufficient to take a decision under this method (e.g. Germany, France, Italy, Spain, the Netherlands, and Belgium).

The weighting of votes in the present arrangement can result in reducing the influence of smaller states on ESM decisions. Thirteen out of nineteen members of the ESM have a combined voting weight below 14 per cent, which is not a sufficient number to block a decision made by a 'majority' of 85 per cent (i.e. perhaps by only six states).

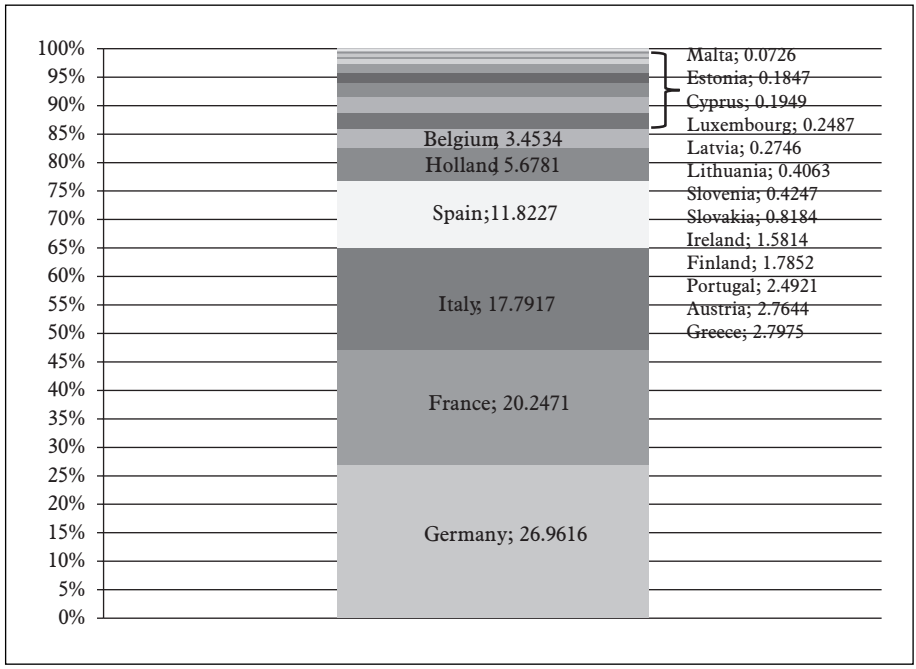
The example of decision-making system in the ESM clearly demonstrates the crucial position of Germany in the new architecture of economic administration in the EMU. Based on its voting weight in the decision-making mechanism, Germany has *de lege* been provided with more power than it held so far under EU rules.[56] What's more, Germany was expected to be the leader in seeking solutions to end the crisis in the euro-zone.[57] EU institutions were not expected to be able to perform

[55] H. Deters, op.cit., p. 204.

[56] C. Ginter and R. Narits, *The Perspective of a Small Member State to the Democratic Deficiency of the ESM*, "Review of Central and East European Law", Vol. 38/2013, p. 66.

[57] These expectations are reflected in the words of the then-Polish Minister of Foreign Affairs: 'And I demand of Germany that, for your own sake and for ours, you help it survive and prosper. You know full well that nobody else can do it. I will probably be first Polish foreign minister in history to say so, but here it is: I fear German power less than

this role and seemed to be unprepared to deal with the crisis. Thus the crisis demonstrated the limits of economic integration without political community. The crisis seemed to call out for further integration: the 'markets' needed to be appeased by all means. Since going back was precluded, the only direction to go was forward – or so it seemed.[58] In the meantime, deepening the euro area was viewed with some ambiguity by the countries outside the euro-zone. Although further integration was alleged to be indispensable to secure the survival of the euro, a more deeply integrated euro-zone also could be seen as a threat to the EU's integrity and to the non-euro-zone members' influence on policy decisions.[59]



Graph 2. Voting weights of particular ESM members

Source: Treaty establishing the European Stability Mechanism.[60]

I am beginning to fear German inactivity'; R. Sikorski, *Poland and the future of the European Union*, http://www.mfa.gov.pl/resource/33ce6061-ec12-4da1-a145-01e2995c6302:JCR (last visited 12.10.2015).

[58] H. Deters, op.cit., pp. 204–208.

[59] D. Schwarzer, *Germany's Role and Strategy in the Euro Area – Determining Factors and Scenarios*, "The Polish Quarterly of International Affairs", Vol. 22, No. 2/2013, p. 63.

[60] Consolidated version following Lithuania's accession to the ESM, Annex I, http://www.esm.europa.eu/about/legal-documents/index.htm (last visited 29.09.2015).

Referring to a core criterion of differentiation - membership in the euro-zone – the above analysis of the subject scope of various regulations responding to the crisis allows one to postulate that the enacted regulations create the possibility of a deeply differentiated role on the part of the non euro-zone states. Insofar as these states' participation in the new instruments and mechanisms is concerned, the following possibilities should be considered:

- the possibility to sign onto a regulation at any date (Euro Plus Pact);
- the possibility to sign onto a regulation before repeal of the temporary derogation or permanent derogation (referring to Denmark);
- the possibility to sign onto a regulation with limited application of its provisions until the derogation is repealed (Fiscal Pact);[61]
- the possibility to participate in certain activities within the mechanisms with observer status (ESM);
- no possibility of participation before the derogation is repealed (ESM, 'two-pack');
- the possibility to leave the mechanism (SSM).

The above demonstrates a certain flexibility in the regulations vis-à-vis their application to non-euro-zone Member States. An important point is the possibility of refusing to participate in a regulation (in case of United Kingdom, the Czech Republic or Hungary). This flexibility resembles the *Europe a la carte* formula proposed in the past, where each of the Member States chooses to undertake the obligations it deems most favourable, but in the decision-making process its position depends on the responsibility the state accepted.[62] In this perspective, considering the risk of fragmentation within the euro-zone, the crisis could be considered as a factor deepening the differentiation within the EMU.

5. Consequences for those states granted the derogation

Taking into account the numerous initiatives and reforms undertaken in response to the crisis, many questions seem worth asking, including those concerning the consequences of these changes for the EMU Member

[61] Only the provisions included in Title III 'Budgetary Pact' and Title IV 'Coordination of economic policy and convergence' can be applied to the states granted the derogation according to the Preamble to the Fiscal Pact. States granted the derogation, according to art. 14.5, and willing to be bound by the provisions included in these Titles are to submit a statement. The statement is optional and it can be submitted at a later date than the moment the ratified document is submitted (which means the possibility of Treaty ratification without being bound by its provisions).

[62] J. Barcz, op.cit., p. 114.

States granted the derogation. The participation of these states in the new mechanisms and regulations determines their role and influence in the decision-making processes related to the EMU – which they are obliged to join in the future. A failure to participate in the new mechanisms could result in reducing the role of the state in the economic governance of the EU.

As illustrated in Graph 1, not all states outside of the euro-zone have chosen accession to the political contracts or intergovernmental agreements being a response to the crisis, despite the fact that these regulations were open to these states to participate in. Not all the states were ready to undertake the commitments (including financial commitments) which would arise as the consequence of their participation in new regulations just in order to gain a good position while discussing the architecture of euro-zone. The crisis has thus revealed a very differentiated determination and a reduced solidarity and responsibility for common matters, which must be viewed as a challenge to the EU as a whole. In this situation, participation in the regulations by only a limited number of Member States appears unavoidable.

As has been mentioned, several reforms were exclusively addressed to euro-zone members. States with a derogation were not included in or bound by the regulations contained in the 'two-pack' or 'six-pack'. What needs to be stressed is that the derogation can result in a non-euro-zone state having limited influence over the form of the regulation(s) being discussed. According to Art. 136 TFEU, being the treaty basis for the regulations mentioned above, members of the Council which have been granted the derogation do not participate in voting in certain matters. The derogation thus means that a Member State, in the institutional dimension, is not able to participate in voting concerning a decision-making process directly related to the euro-zone.[63] Hence, considering the fact that many reforms are being addressed only to euro-zone states, derogation could contribute to a further fragmentation within the EU.

However, after having joined the euro-zone, the states with the derogation (including Poland) will be bound by the entire EMU *acquis*, including that over which they had limited or none influence. In the case of the regulations included in the EU legal order (e.g. the 'two-pack'), this situation is even less justifiable than in the case of the legal solutions adopted outside the EU legal framework, i.e. using the Schengen

[63] A. Nowak-Far, *Zasadnicze instytucjonalne i prawne wymiary przystąpienia Polski do strefy euro* (*Fundamental Institutional and Legal Dimensions of Poland's Accede to Euro-zone*) in: *Wprowadzenie euro w Polsce: za i przeciw* (*Introduction of the Euro in Poland: For and Against*), Biuro Analiz Sejmowych, Wydawnictwo Sejmowe, Warszawa 2013, p. 28.

method, as was the case of the Treaty establishing the European Stability Mechanism (ESM).

When discussing this treaty (addressed only to euro-zone states), the reduced role of non-euro-zone countries was evident as early as during the negotiations over the content of the new mechanism, which was being elaborated by a very limited number of states (Germany and France being clearly the main actors). Similarly to the case of the 'two-pack', only the states adopting the single currency will become ESM members, with an obligation to financially contribute to its capital. This new duty imposed on a state adopting the euro results from Art 2 and point 7 of the Preamble to the ESM Treaty. One may ask whether this is it a new requirement imposed on the states aspiring to the euro-zone when they enter the stage of accepting the single currency. In Poland, this question has been explicitly addressed, both in the academic perspective and through a ruling of the Constitutional Tribunal (CT).[64] According to the Constitutional Tribunal, Poland will not be obliged to participate in the mechanism when it joins the euro-zone, and there are good reasons to justify this standpoint. According to the CT, there is no regulation of international or EU law binding on Poland that would demand it to abide by the norms included in an international treaty of which Poland is not a party. Neither the Treaty on European Union nor the Treaty on Functioning of the European Union can be treated as such a basis, as the TESM is not a part of EU law.[65] However, the CT's ruling did not dispel all the doubts concerning Polish membership in euro-zone. The decision was not unanimous: five judges expressed a dissenting opinion. According to J. Barcz, participation in the ESM has indisputably become another condition of joining the euro-zone.[66]

[64] The Constitutional Tribunal's decision on Poland's possible membership in the ESM came while ruling on the conformity of ratified European Council decision No. 2011/199/UE with the Constitution of Polish Republic.

[65] Constitutional Tribunal, 26 June 2013 (K 33/12) – Sentence – *Tryb ratyfikacji decyzji Rady Europejskiej 2011/199/UE w sprawie zmiany art. 136 TFUE* (*The Procedure of Ratification of the European Council Decision 2011/199/EU on the Amendment of Art. 136 TFEU*) in: *Wybrane orzeczenia Trybunału Konstytucyjnego związane z prawem Unii Europejskiej (2003–2014)* (*Selected Constitutional Tribunal Rulings related to the Law of the European Union (2003–2014)*), Studia i Materiały Trybunału Konstytucyjnego, Tom L, Warszawa 2014, p. 438. This reasoning is consistent with the position of the Court of Justice of the European Union that in its ruling in C-370/12 (point 3 of the ruling) asserted that the Member State's right to establish and ratify the ESM Treaty is not dependent on decision 2011/199 coming into force. This means that the ESM is an independent institution with its own legal personality.

[66] J. Barcz, *Konsolidacja grupy euro: umocnienie efektywności Unii, czy groźba jej frag-*

Numerous and far-reaching reforms have changed the institutional shape of the Economic and Monetary Union. States with the temporary derogation (including Poland), obliged to participate in the single currency, will have to accept all EMU *acquis*, including the new regulations formulated in response to the crisis. Even if Poland might someday prefer to avoid the obligation to adopt the euro – a consequence of institutional choices taken in the past – it cannot. Poland is legally bound to join the euro-zone no matter what.[67] This also refers to the other EU Member States which have not adopted the single European currency yet are obliged to do so, in contrast to the United Kingdom and Denmark with their permanent derogations. The acceptance of certain solutions could be a real challenge. In the case of mechanisms established outside of the EU legal framework, ratification according to national constitutional provisions will be necessary. This process can cause political turmoil in a state that might be aspiring to become a member of the euro-zone, and the result of the ratification process cannot be prejudged. In this context, full economic and monetary integration may result in certain fiasco at the stage of legal convergence. On the other hand, the euro-zone can function in a more stable manner due to the reforms and accession to a strengthened euro-zone would be an advantage. Hence the necessity to accept new and additional regulations can constitute a dilemma on the road towards full economic and monetary integration in those states granted the derogation.

Conclusions

The aim of the paper has been an attempt to analyse the issues related to differentiated integration within the EMU. The analysis of the process of constructing an economic and monetary union initiates the reflection that differentiation in this area was unavoidable. Differentiation in the EMU structure, resulting in a limited number of the states having introduced the euro, reflected the limited readiness and willingness to join the euro-zone on the part of particular EU states. Significant differences among the EU states led to some concessions. (The best example of this was the modification of Danish membership in the EMU so that a second Danish referendum would ratify the Maastricht Treaty). Constructing the EMU

mentacji? Aspekty prawne i instytucjonalne (*Consolidation of the Euro Group: Strengthening the Union's Effectiveness or a Threat of Fragmentation? Legal and Institutional Aspects*), "Ruch Prawniczy, Ekonomiczny i Socjologiczny", No. 2/2011, p. 22.

[67] A. Visvizi and P. Tokarski, op.cit., pp. 458–459.

without these concessions could have ended in a fiasco, and it seemed difficult to find any alternative to differentiated integration at the time.

The differentiation, which related to both the readiness and will to access the euro-zone by particular EU Member States, is still an open issue at present, when there are 19 states within the euro-zone. The nine states remaining outside of the euro-zone constitute a minority group in the EU. In addition, there are states within this minority group wherein the attitude of the society is not favourable to single currency at this time (the Czech Republic), as well as the states continuing the debate over accession to the euro-zone (Poland). These states, being outside of the euro-zone, do not benefit from the single currency and, which is equally important, do not influence the regulations addressed only to euro-zone members. The numerous regulations, issued in the response to the most serious crisis in the EMU's short history, reflect a certain dissymmetry between the states within the 'hard core' of economic and monetary integration and the other EU states. Taking into consideration also the differentiation within the euro-zone itself (concerning the positions of particular states of the euro-zone in the decision-making processes of the newly-introduced mechanisms), the analysis presented in the paper leads to the conclusion that the crisis has been a significant factor in deepening differentiation, both within the EMU and the EU.

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